

In The Matter of the Arbitration Between)	
)	
West Allis Professional Firefighters Association Local 342)	
)	
and)	
)	
City of West Allis)	Decision # 38462-B
)	
Interest Arbitration)	
)	
WERC Case ID 313.0005, Case Type MIA)	

OPINION AND AWARD

The hearing in the above captioned matter was held on December 14, 2020, conducted by video conference, before Martin H. Malin, serving as the sole impartial arbitrator by selection of the parties. The Union was represented by Mr. Christopher J. MacGillis, its attorney. The Employer was represented by Mr. Kail Decker, City Attorney. The hearing was held pursuant to Section 111.77 of the Wisconsin Statutes.

At the hearing, both parties were afforded full opportunity to call, examine and cross-examine witnesses, introduce documentary evidence and present arguments. Both parties filed post-hearing briefs and reply briefs.

The Final Offers

The parties’ final offers differ with respect to wages and contract duration.¹ The Union proposes a two year contract, running from January 1, 2020 through December 31, 2021. The Employer Proposes a one year contract running from January 1, 2020 through December 31, 2020. The parties’ final offers with respect to wages are as follows:

¹There is a slight difference in the parties’ offers concerning health insurance. Both propose that effective July 1, 2020, employees’ share of the monthly premiums will be 14% with HRA and 20% without HRA. Owing to its proposal of a two-year contract, the Union proposes that effective December 1, 2021, that will increase to 15% with HRA and 20% without HRA. The Employer’s final offer also includes removing Section 6 because it is a prohibited subject of bargaining. The Union’s final offer does not expressly address Section 6 but the Union has indicated that it does not oppose its removal.

<u>Effective Date</u>	<u>Union Offer</u>	<u>Employer Offer</u>
Jan. 1, 2020		2.25% increase
April 1, 2020	3.0% increase	
Jan. 1, 2021	2.0% increase	
Oct. 1, 2021	1.0% increase	

The Statutory Factors

Section 111.77(6) of the Wisconsin Statutes provides for the arbitrator to base his findings on the following factors:

(am) In reaching a decision, the arbitrator shall give greater weight to the economic conditions in the jurisdiction of the municipal employer than the arbitrator gives to the factors under par.

(bm). The arbitrator shall give an accounting of the consideration of this factor in the arbitrator's decision.

(bm) In reaching a decision, in addition to the factors under par (am), the arbitrator shall give weight to the following factors:

(1) The lawful authority of the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

(4) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services with other employers generally:

(a) In public employment in comparable communities.

(b) In private employment in comparable communities.

(5) The average consumer prices for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.

(7) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(8) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Background

This matter concerns the terms of a successor agreement to the parties' 2018-19 collective bargaining agreement. The parties submitted their final offers in July 2020. By order dated August 5, 2020, the Wisconsin Employment Relations Commission certified that the parties had met the conditions precedent to the initiation of compulsory interest arbitration and initiated the process. By order dated September 16, 2020, the WERC appointed the undersigned as impartial arbitrator pursuant to the parties' selection.

The parties have stipulated that the following communities are comparable to West Allis:

Brookfield
Franklin
Greenfield
Menomonee Falls
New Berlin
Oak Creek
South Milwaukee
Waukesha
Wauwatosa

Employer's Position

The Employer argues that its final offer should be selected. The Employer contends that the economic conditions of the employer, which the statute commands to receive greater weight, supports its final offer. The Employer urges that, among the comparable communities, it ranks last in median household income, local real estate tax rate and equalized tax rate. Its poverty rate of 12.4% is the second worst among the comparable communities. In the Employer's view, its economic conditions relative to the external comparables would justify a wage increase lower than the increase given in the comparable communities. Despite this, says the Employer, it has offered a 2.25% increase for 2020 which is equal to or greater than the increases in every comparable community.

The Employer disputes the significance of its 2019 Comprehensive Annual Financial Report as a mere snapshot in time and does not convey the financial distress it has felt as a result of the Covid-19 pandemic. Furthermore, says the Employer, the issue is not ability to pay, which the Employer concedes it has, but capacity to pay. The Employer urges that it is dependent on the substantial subsidy it receives under the State's Expenditure Restraint Program, but to maintain that subsidy, its budget may not increase more than 2.3% in 2020 and 2.1% in 2021. To the extent that the wage increase exceeds those levels, says the Employer, it must offset the excess with cuts in other areas.

The Employer contends that the only factor supporting the Union's final offer on wages is internal comparability with the police unit. But, in the Employer's view, the firefighters and police have not had parity since 2014. Furthermore, according to the Employer, police-firefighter parity is not warranted because the employees perform very different functions and work very different schedules. A rigid requirement to maintain parity, the Employer maintains, would inhibit the Employer from remedying inequities which would be detrimental to morale and recruitment. With respect to the current dispute, the Employer urges, it agreed to 3.0% and 3.25% in 2020 and 2021 with the police because the police hourly wage rate ranked at the bottom of the comparable communities. A rigid rule of parity, the Employer argues, would inhibit it from remedying such situations in the future because any above external comparable increases for one group would result in similar increases for the other group regardless of whether such increases were justified.

The Employer maintains that, although a comparison of hourly wage rates to the external comparables justified above-range increase to the police, the same cannot be said for the firefighters. The Employer points to a 2017 report from Carlson Dettman comparing the hourly wages rates of West Allis police and fire personnel to the comparable communities. The report showed that the police patrol officers ranked tenth among the ten communities, regardless of whether they resided within City limits or in the perimeter area allowed in the contract. (Employees receive higher pay if they reside within the City.) The report showed that the hourly pay of West Allis firefighters ranked second for residents and third for those residing in the perimeter, and paramedics ranked first for residents and second (only \$.02 less than the highest hourly wage) for perimeter residents. The Employer maintains that the study demonstrated a need to reduce the gap between West Allis police wages and the comparable communities leading to the 2018-21 contract with its 3% to 3.25% annual increases. In the Employer's view, no similar need exists for the firefighters. In contrast to the police and what the firefighters are proposing, the Employer observes that its non-represented employees received a 1.5% increase, or a 2.0% increase if they lived within City limits, in 2020.

The Employer recognizes that the parties' final offers cost the same in 2020, as the Employer's 2.25% increase effective January 1 equates in terms of money expended over the year to the Union's 3.0% increase effective April 1. However, says the Employer, the Union's offer results in a higher base going into 2021 than the Employer's and thus costs more in 2021 and beyond. When the effect of the Union's proposed 3% raise for 2021 is added to the mix, the Employer calculates the added expense of the Union's offer at \$94,136.

The Employer contends that the increases in the cost of living support its final offer. The Employer urges that the CPI-U increased 1.9% as of September 30, 2019, and 1.4% as of September 30, 2020. The Employer's proposed 2.25% increase effective January 1, 2020, it maintains, is closer to the increase in the CPI than the Union's proposed 3.0% increase.

The Employer argues that the pandemic-related uncertainties it faced when it submitted its final offer in July 2020 justified its one-year proposed term. The Employer avers that as of July 2020, guidance from the United States Department of the Treasury and the State of Wisconsin indicated that funds under the Routes to Recovery provisions of the CARES Act could not be used for expenses that were already budgeted. It wasn't until revised guidance issued September 25, 2020, that local governments were allowed to use CARES Act funds to cover salaries and overtime of employees diverted to Covid response activities even if their salaries and overtime had already been budgeted. The Employer observes that if it had the advantage of the revised guidance when it submitted its final offer in July, it would have been able to submit a two-year offer. The Employer concludes that then totality of the statutory factors compel selection of its final offer.

Union's Position:

The Union contends that its proposal should be selected. The Union maintains that the economic conditions of the Employer support the Union's offer. The Union points to the 2019 CAFR as reflecting a municipality in strong economic shape. Its bond rating is AA2, demonstrating strong credit-worthiness. Furthermore, says the Union, the Employer admits that the Union's proposed increase for 2021 is already baked into the budget. The Employer's demographic and economic rankings among the comparable communities, claims the Union, do not provide any evidence of probative value to a comparative evaluation of the final offers.

The Union urges that there is no economic difference between the parties' offers for 2020. The Union's offer of a 3% increase effective April 1 costs the same and provides the same additional income to the employees in 2020 as the Employer's offer of a 2.25% increase effective January 1. In light of the revised guidance concerning CARES Act funding, the Union maintains, more of its proposed increase can be reimbursed than of the Employer's proposed increase as the costs incurred in January and February 2020 are not reimbursable.

The Union challenges the Employer's calculation of a \$94,1326 cost difference between the two final offers. The Union observes that the Employer's costing exhibit (City Ex. 8) contemplates that three vacant firefighter positions vacant in 2019 and 2020 will be filled in 2021, but the Employer indicated in its 2021 budget an intent not to fill them.

The Union observes that, in May 2020, the Employer offered a 3% increase effective April 1, 2020. The Union avers that the Employer has provided no persuasive explanation for its change in position a mere two months later in July.

The Union maintains that there has been parity between police and firefighters going back at least to 2003. The Union urges that parity does not necessarily mean identity, although in many years the across the board increase for both groups were identical and the annual salaries differed by trivial amounts. The Union recognizes that in 2015 firefighters received a 5% raise while police received a 2% raise but urges that in 2016, firefighters received 0 while police received 2% and in 2017, firefighters received 1% while police received 2%. In the Union's view, both groups received a total of 6% over the three year period, although the Union concedes that by front-loading most of the raise, firefighters received more total money over the three year period. The Union argues, however, that the front-loading was further compensated for when firefighters received 1.75% in 2018 while police received 2%.

Alternatively, the Union argues, if I am not persuaded by its parity analysis, I should nonetheless give weight to the police contract because the police are the only relevant internal comparable. In the Union's view, the increases given to non-represented employees are irrelevant because they are not bargained. Only the police and firefighters engage in collective bargaining and only the police and firefighters have jobs that endanger their lives every day, says the Union.

The Union rejects the Employer's analysis of the external comparables. The Union argues that the Employer's analysis is flawed because it is based on an hourly wage rate that is artificial and relevant only for calculating overtime pay in accordance with the Fair Labor Standards Act. For all other purposes, the Union maintains, firefighters are treated like salaried employees. West Allis firefighters receive work reduction days to avoid having to pay overtime. Depending on whether a firefighter has a work reduction day in a pay period and on how the firefighter's one day on followed by two days off fall in the pay period, a firefighter's hours worked will vary but regardless on how many hours the firefighter works in the pay period, the firefighter receives the same base salary for the pay period. Firefighters in some of the comparable communities, the Union observes, do not receive work reduction days. For this and other reasons, the number of hours worked in comparable communities is higher, resulting in a lower hourly wage rate, but, according to the Union, when firefighters negotiate wages and compare them across communities, they focus on annual base salaries.

The Union argues that when annual base salaries are considered, the firefighters do not fare much better than the police compared to the comparable communities. The Union focuses on base salaries for employees residing in the perimeter outside City limits because of the 93 bargaining unit members, only 17 live in the City. The Union's analysis shows West Allis firefighters ranking ninth of the ten comparable communities, with only South Milwaukee paying less. (Firefighters residing within City limits rank eighth, exceeding New Berlin as well as South Milwaukee.) In the Union's view, analysis of the external comparables supports its final offer.

The Union argues that the public interest also supports its final offer. The Union maintains that there is no dispute that the Employer has the ability to pay the Union's offer. In the Union's view, the Employer's one-year contract proposal is not in the public interest because, if awarded, the contract will already have expired and the parties will have to begin negotiations anew immediately. Furthermore, says the Union, the Employer has admitted that its reason for a

one-year proposal no longer applies. The Union urges that, overall, its final offer better comports with the statutory factors.

Discussion:

The arbitrator has considered his notes of the hearing, the exhibits, the parties' briefs, reply briefs and arguments, and all authority relied on therein. As I have stated elsewhere on numerous occasions,² interest arbitration represents the breakdown of the parties' collective bargaining process. The arbitrator's function is to determine what contract terms the parties most likely would have agreed to if the collective bargaining process had not broken down. The weight to be given each factor listed in Section 111.77(6) is to be assessed in light of its value in making such a determination.

Section 111.77(6)(am) requires that I “give greater weight to the economic conditions in the jurisdiction of the municipal employer” and that I “give an accounting of the consideration of this factor in the arbitrator’s decision.” Accordingly, I begin with an analysis of the economic conditions in West Allis.

Initially, I observe that I agree with the Employer that the 2019 CAFR is not entitled to much evidentiary weight because it predates the Covid-19 pandemic. The Employer emphasizes that it has the lowest median household income and real estate values, the highest real estate tax rate and the second highest poverty rate of the comparable communities. If the Employer were offering wage increases below those of the comparable communities, the statutory requirement that the economic conditions in West Allis receive greater weight than the other statutory factors might well diminish the weight given to the external comparables. But the Employer is offering a 2020 wage increase equal to or greater than the increases in all of the comparable communities.

The Employer also emphasizes what it terms capacity to pay as opposed to ability to pay. Because the Employer relies on Expenditure Restraint Program funds, its capacity to pay is limited to keep its budget within the 2.3% budget increase allowed by the Program for 2020 and the 2.1% increase allowed for 2021, is limited.

The Employer’s argument, however, is undermined by the fact that the Employer’s standing among the comparable communities in economic demographics and its need to keep its budget within the parameters set by the Expenditure Restraint Program existed in 2019 when the Employer agreed to police salary increases of 3.25%, 3% and 3.25% through 2021. These conditions also existed in May 2020, when the Employer’s preliminary final offer for 2020 was identical to the offer the Union has made in this proceeding. The Employer has offered no

²See, e.g., *AFSCME Local 1366C and Fond du Lac County*, Decision No. 29580-A at 5 (Malin 1999). For a more detailed explanation, see *Village of Oak Lawn and Oak Lawn Professional Firefighters Local 3405, IAFF*, Ill. Lab. Rel. Bd. N. S-MA-18-341 at 4-5 (Malin 2019), accessible at <https://www2.illinois.gov/ilrb/arbitration/Pages/Arbitration2019.aspx>.

explanation as to what changed in the two months between its preliminary final offer and its ultimate final offer.

The Employer's argument seems to be that because its economic demographics compare unfavorably to those of the comparable communities and because of the restrictions of the Budgetary Restraint Program I should award its final offer because it costs less. But the Employer's actions have been inconsistent with its arguments. On the record before me, I am unable to find that the economic conditions factor supports the Employer's final offer.

Turning to the other statutory factors, I find that the issue of contract duration strongly supports selection of the Union's final offer. The Employer's final offer was presented in July. At that time, there was considerable uncertainty due to the pandemic. Available guidance suggested that CARES Act funds could not be used to reimburse payroll expenses that had been budgeted. But the statute requires that I consider changes that have occurred during the proceeding and the major change here was the revised guidance issued in September. That guidance provided that budgeted salary and overtime expenses could be submitted for reimbursement if the employees were substantially dedicated to pandemic-related tasks. Most significantly, the guidance provided that for public safety employees, "state and local governments are 'not required to perform an analysis or maintain documentation of the substantially dedicated conclusion for payroll expenses of public safety, public health, health care and human services employees. . . . [G]overnments may presume that public health and public safety employees meet the substantially dedicated test unless then chief executive (or equivalent) of the relevant government determines that specific circumstances indicate otherwise.'" (City Ex. 14).

As testified to by Deputy Finance Director Kris Moen, the revised guidance allowed the Employer to "offload some regularly budgeted expenses to CARES Act money." This does not mean, as the Union would have me believe, that the Employer could offload all firefighter salaries to CARES Act funds. The record does not reflect how much CARES Act funding the Employer received but it is highly unlikely that the Employer received a sufficient amount to cover the payroll of all of its workers eligible for the substantially dedicated presumption. But, the Employer has represented that had it had the revised guidance when it presented its final offer in July, it would have proposed a multi-year contract. The revised guidance has dissipated the reason for the Employer's limiting its final offer to a one-year contract.

On the other hand, the public interest and welfare factor strongly supports a two-year contract. If I select the Employer's final offer of a one-year contract, the contract that I award will have expired three months before the award is issued. The parties will have to begin new negotiations immediately. They will not have any space to assess the effect of the contract and the dynamic conditions posed by the pandemic. Moreover, after the parties submitted their reply briefs, Congress passed and the President signed the American Rescue Plan Act of 2021 (signed by the President on March 11, 2021). The Act includes billions of dollars of aid for state and local governments but it is not as yet clear how the aid will be distributed and what share, if any, the Employer will receive and subject to what restrictions. A two-year contract, expiring

December 31, 2021, affords the parties some time to assess the situation, learn about the impact of the new federal act, take into account the changing dynamics of the pandemic, including the current vaccination efforts, and negotiate with likely better information than they have available to them if they begin negotiations now.

Turning to wages', the parties' offers are functionally the same for 2020. A 3% increase effective April 1 (the Union's offer) gives the employees the same new money and costs the Employer the same amount in 2020 as the Employer's offer of 2.25% effective January 1. Of course, the Employer is correct that the Union's offer results in a higher base at the end of 2020 which translates into a higher cost for 2021 and for any increase that would be implemented in 2021. But the Employer's initial final offer, presented in May, was identical – 3% effective April 1. There is nothing in the record reflecting any changes between May and July when the Employer presented its final final offer that explains or justifies the change in position.

The parties disagree over whether there remains a pattern of parity between police and firefighters. The disagreement begins with 2015. In 2014, police and fire each received 2% increases and their total pay differed by only \$10.00 (Ass'n Ex. 4A). In 2015, firefighters received a 5% increase while police received 2%. But in 2016, firefighters received no increase,³ while police received 2% and in 2016, firefighters received 1% while police received 2%. Thus, over the three-year period, both groups received increases totaling 6%. Of course, when compounding is considered, because five-sixths of the firefighter raise was front-loaded, firefighters received somewhat more over the three year period than police. But the police caught up in 2018 when they received 2% while the firefighters received 1.75%. Thus, over this four-year period, a rough parity was maintained.

The only real anomaly occurred in 2019 when firefighters received 2% while police received 3.25%. This is explained by the timing of the two bargaining units' contracts. In 2019, the firefighters were in the final year of a two-year contract while the police were in the first year of a new three-year contract. Rough parity remains as the total pay for the bargaining units differs by only approximately \$1,000.

Turning to the external comparables, the Employer's offer is in line with the percentage increases provided by the comparable communities. But the Employer agreed to above-comparable wage increases for the police. The employer maintains that the police increases were driven by the recognition that the police ranked at the bottom of the list of comparable communities for salary and needed some catch-up. This begs the question of whether the firefighters are in a similar position. The answer to that question turns on what metric is used to compare communities.

The Employer urges that the appropriate metric is hourly wage rate while the union urges that it is annual salary. If hourly wage rate is used, West Allis firefighters ranked fourth among

³They did receive a lump sum payment of \$3,000, but that was a quid pro quo for removal of half a vacatin column. It did not go into base pay and was not pensionable.

the comparable communities in 2019 (Un. Ex. 5A). If annual salary is used, the majority of West Allis firefighters who did not live within the City limits ranked ninth while the group living within the City ranked eighth (*Id.*). After considering the positions of both parties, I have concluded that the appropriate basis for comparison is annual salary.

Hourly wage rate is a largely artificial number that is needed for computing overtime in compliance with the FLSA. Firefighters are paid the same salary amount each pay period regardless of how many hours they work in the pay period (unless they work overtime). The number of hours worked can vary based on whether the pay period includes a work reduction day and on how the 24 hours on, 48 hours off fall during the pay period. Moreover, Union President Tyson Novinska testified that annual salary is generally what the parties look at in negotiations.

One reason for considering external comparability is recognition that when pay falls too far behind comparable communities it can lead to morale problems and difficulty in recruiting and retaining employees. The Employer and the police union apparently realized this in 2019 and sought to ameliorate it with percentage increases providing for some catch-up. For firefighters, morale and recruitment and retention issues are more likely to result from comparisons of annual salaries than from comparisons of hourly wage rates that are largely artificial.

But even using annual salary as a metric for comparison, firefighters do not fare as poorly as police who ranked last among the comparable communities. Firefighters, nonetheless, do rank toward the bottom, with the overwhelming majority who reside outside City limits ranking ninth and the few who live within City limits barely moving into eighth place. Moreover, as discussed above, the Employer's initial final offer for 2020 was the same as the Union's final offer for that year (3% effective April 1) and the record contains no evidence of any changes between May and July that explain or justify the Employer's change in position. Although the question is close, I conclude that the firefighters' slightly better comparative position vis-a-vis the comparable communities does not outweigh the long-standing rough parity that exists between the two bargaining units.

Although the issue of wages is close, as discussed above, the issue of contract duration is not at all close. As discussed above, the interests and welfare of the public weighs heavily in favor of the Union's final offer of a two-year contract. My authority is limited to selecting the entire final offer of one of the parties. Integrating the very strong case for the Union's final offer on contract duration with the much closer question of wages compels the selection of the Union's final offer as the one which better comports with the statutory factors and is more likely to have been the contract that parties would have agreed to if their bargaining process had not broken down.

A W A R D

Based on all of the factors provided in Section 111.77 (6) of the Wisconsin Statutes, and giving greater weight to the economic conditions in West Allis, for the reasons set forth in the opinion above, the Union's final offer is selected.

Chicago, Illinois
March 31, 2021

A handwritten signature in black ink, appearing to read "Martin H. Malin". The signature is fluid and cursive, with a large initial "M" and "H".

Martin H. Malin. Arbitrator